Office Supreme Court, U. S.
FILED
SEP 17 1923
WM. R. STANSBURY
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 268.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,
Petitioner and Defendant in Error,

vs.

O. J. Nichols,
Plaintiff in Error.

Petitioners

Brief and Argument for Defendant in Error.

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Brief and Argument for Defendant in Error.

NOTE: Transcript references are to pages of printed Transcript of Record which accompanied Petition for Writ of Certiorari and which, by stipulation, constitutes the return to said writ.

STATEMENT OF THE CASE.

Nature of the Action.

The Atchison, Topeka and Santa Fe Railway Company, a corporation (hereinafter referred to as petitioner) seeks to have reviewed and re-

versed a judgment [Tr. 67; 286 Fed. 1] of the United States Circuit Court of Appeals for the Ninth Circuit (herinafter referred to as the Cirsuit Court of Appeals) which reversed a judgment [Tr. 49, 50] rendered by the United States District Court for the southern district of California, southern division (hereinafter referred to as the District Court) in favor of petitioner in an action brought against it by the plaintiff in error for the recovery of heavy damages for the alleged wrongful death of his wife.

Manifestly the action, as will hereinafter appear, was brought in California on the supposition that the laws of New Mexico permitted recovery of compensatory damages for wrongful death substantially the same as in California. But an examination into the laws of New Mexico disclosed the existence of a *special* statute creating a right to recover a forfeiture, not damages, from railroad companies and stage coach lines for the death of a passenger caused by negligence and that this statute gave the sole right in New Mexico to recover for the death of a person dying from injuries received by the carrier's negligence while a passenger on a railroad, stage coach, or other public conveyance.

The case involves, therefore, the enforcement in California or in a Federal Court sitting in that

state, of a statute of the state of New Mexico, copied from a statute of Missouri, which created a special action against public carriers alone in favor of certain specified persons whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage coach or other public conveyance; and which statute declared that for every passenger dying from an injury resulting from or occasioned by any defect or any insufficiency in any such railroad locomotive, stage coach or other public conveyance, the corporation or public carrier should *forfeit and pay* for every such person and passenger so killed, the sum of Five Thousand (5000) Dollars.

Statute Involved.

The statute upon which the decision of the Circuit Court of Appeals rests is Section 1820 of the New Mexico Annotated Statutes of 1915. That statute is also contained in the compiled laws of New Mexico of 1884 as section 2308 and in the compiled laws of the later edition as section 3212 and reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal in-

tent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage coach or other public conveyance whilst in charge of same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or in any stage coach or other public conveyance, the corporation, individual or individuals in whose employe any such officer, agent, servant, employe, engineer or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered. First, by the husband or wife of the deceased, or, second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or, third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead then the survivor. In any suit instituted under this section it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency."

Petitioner was at all the times here involved, a corporation engaged in the operation of a steam railroad from California to Chicago operating regular passenger trains for the transportation of persons for hire. In June, 1920, Mary J. Nichols, wife of the plaintiff in error, was a passenger on one of these trains; and when passing through the state of New Mexico, she was thrown from the car in which she was riding by a jerk or jar of the train and received injuries from which she died in the state of New Mexico on the 1st day of July, 1920.

The plaintiff in error, in his individual capacity, brought an action against petitioner in the Superior Court of the state of California in and for the county of Los Angeles, for the death of his wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000; in the loss of her society, love and affection, in the sum of $20,000, and further damaged in the amount of $586.42 for expenses incident to the last illness and funeral expenses of his wife, for railroad fare and various other specified expenses.

Petitioner, the defendant in said action, within the time allowed by law, asked for and secured the removal of said action into said District Court on the ground of diversity of citizenship, where the case was tried by the

court without the intervention of a jury, a jury having been waived by the written stipulation of the parties. Judgment was entered for petitioner on findings and conclusions. [Tr. 49, 50.]

Plaintiff in error, by proceedings in error, thereafter caused the record, proceedings and judgment to be submitted to and reviewed by the Circuit Court of Appeals upon the errors there assigned and urged [Tr. 52, 53].

The assignment of errors raised really but one question, namely: whether judgment should have been entered for petitioner or should have been entered for plaintiff in error for $5000.

At the time when said action was commenced and during all of the times herein mentioned, the sole recovery allowed by the laws of New Mexico against a common carrier for the death of a passenger resulting from or occasioned by the negligent operation or by any defect or insufficiency of any railroad or any part thereof, or in any locomotive was and is that given by said Section 1820 of the New Mexico Annotated Statutes of 1915, copied at page 5 hereof.

View of the Circuit Court of Appeals.

The Circuit Court of Appeals, by its opinion (286 Fed. 1) on the authority, principally of Huntington v. Attrill, 146 U. S. 657, reversed the District Court holding that said Section

1820 of the New Mexico state was non-penal in the international sense, and would be enforced in said cause and court for the benefit of the plaintiff in error [Tr. 67-75] and entered judgment reversing the judgment of the District Court in said cause and remanded the cause to said District Court with directions to enter judgment in favor of plaintiff in error for $5000 with costs. [Tr. 75, 76.]

The Circuit Court of Appeals thereafter denied an application for a re-hearing of said cause, properly and timely interposed by petitioner, and, its decision being reviewable only by certiorari, petitioner applied to this court for the writ which was issued herein. It having been stipulated that the record which accompanied the petition may be considered as a return to the writ of certiorari, the judgment so rendered by the Circuit Court of Appeals is now before this court for review, pursuant to the provisions of Section 240 of the Judicial Code upon the following:

Points and Specification of Errors Relied Upon.

First: No civil action for death of a human being exists at common law. It is wholly the creature of statute. If no survival is wrought by statute, the action must abate.

Second: If a right of action is given by statute (not of a penal nature) of the state in which the injury and death occurred, the right may be enforced in any tribunal having jurisdiction over the defendant, provided always such statute is not opposed to the *lex fori.*

Third: The decision of the Circuit Court of Appeals erroneously enforces and administers a penal statute outside the state to which it belongs or other than the state in which enacted.

Fourth: The decision of the Circuit Court of Appeals erroneously enforces a foreign statute in a jurisdiction (California) where such statute is obviously in conflict with and opposed to the spirit and policy of the laws thereof.

Fifth: Plaintiff in error has no remedy in this action except under Section 1820 of the Laws of New Mexico, Ed. of 1915, which statute undertakes to create new and extraordinary civil liability upon common carriers alone for the wrongful death of a passenger, wherein and whereby the element of punishment clearly predominates, by compelling the payment by the common carrier of a forfeit of $5000, no less nor more, regardless of damages, whereas, it is the settled law of California, binding alike on all of the courts both state and federal sitting therein, to determine the amount of damages in all cases and against all wrong-doers, be they

individuals, corporations or common carriers (when the death of a person is caused by wrongful act) according to the evidence of pecuniary loss, and which damages shall be strictly compensatory, for such pecuniary loss as proved.

Sixth: A statute like the one in New Mexico, which authorizes a recovery without any showing of damages, is not one for the recovery of damages.

Seventh: The decision and judgment of the Circuit Court of Appeals directing the District Court to enter judgment in favor of the plaintiff in error, [Tr. 75, 76] thereby enforcing in California said New Mexico statute, are predicated upon the erroneous assumption that the instant case is ruled by the doctrine of Huntington v. Attrill, 146 U. S. 657.

Eighth: The decision of the Circuit Court of Appeals in the instant case is in conflict with the Federal Court in Ohio and the Supreme Courts of the states of Illinois, Iowa and Kansas, in that in every instance where either the New Mexico statute here in question or the like statute of Missouri had been attempted to be used as a basis of an action in another state, recovery has been refused.

Ninth: The decision of the Circuit Court of Appeals is in conflict with the Federal Court

sitting in Colorado and with the decisions of the highest courts of many of the states refusing recovery in actions based upon foreign statutes substantially the same as the New Mexico statute.

BRIEF OF THE ARGUMENT.

I.

The decision and opinion of the Circuit Court of Appeals is set out at pages 67 to 75, both inclusive, of the transcript.

The basic rule of law applicable in this case is stated in the opinion of the Circuit Court of Appeals in accordance with the contention of petitioner and the ruling of the District Court as follows:

> "The defendant in error having removed the action from the court of the state in which it is brought on the sole ground of diversity of citizenship, this court must hold the case governed by the rules that would have controlled it had it not been so removed. It was so held in effect by this court in the case of N. P. Ry. Co. v. Kempton, 138 Fed. 992, 998, 999. See also, Spokane Inland E. Rd. v. Whitley, 237 U. S. 487, and cases there cited." [Tr. 68, 69.]

II.

Under the law of the forum—the law of California—the right to recover for death resulting from injuries incurred as a passenger

on a railroad train in New Mexico is only that given by said Section 1820 of the laws of New Mexico and there can be no recovery, except such as is allowed by that statute:

McManus v. Canning Co., 37 Cal. App. 133;

Ryan v. No. Alaska S. Co., 153 Cal. 438;

Spokane v. Whitley, 237 U. S. 487;

Romero v. Ry. Co., 11 N. M. 679, 72 Pac. 37;

Clay v. Ry. Co., Texas, 228 S. W. 907;

Phoenix R. R. v. Landis, 231 U. S. 578;

Adams v. Fitchburg R. R. Co., 67 Vt. 76, 30 Atl. 687;

Barnes v. Alexander, 232 U. S. 117;

Northern Pacific v. Hambly, 154 U. S. 349;

O'Reilly v. N. Y. N. E. R., 16 R. I. 388; 17 Atl. 906;

St. Louis Ry. Co. v. Seale, 229 U. S. 156;

Kramer v. Ry. Co., 25 Cal. 434;

Gallagher v. Ry. Co., 196 Fed. 1000;

McClain v. Ins. Co., 110 Fed. 80 (91);

Ill. Cent. v. Ihlenberg, 75 Fed. 873;

Wilson v. Tootle, 55 Fed. 211;

Hopper v. Denver etc., R. Co., 155 Fed. 273;

Derrickson v. Smith, 27 N. J. L. 166;

Bird v. Hayden, 1 Robertson, N. Y., 383;

Pickering v. Fisk, 6 Vt. 102;

Ind. Etc. v. John *et al.*, 5 Hammond (Ohio), 217;

Finney v. Guy, 189 U. S. 335, 47 L. Ed. 839;

Minor on Conflict of Laws, section 10;

Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;

Grier v. Kansas City Etc. Ry. Co., 228 S. W. R. (Mo.) 454;

Pryor v. Payne, 244 S. W. R. (Springfield Court of Appeals Mo.), 369.

Treadway vs. United Railways Co. of St L
III. 253 S. W. Rep. p 1037

There can be no recovery in California either in the state or federal court under section 1820 of the New Mexico statutes because the policy of that statute is opposed to the policy of the state of California.

Lange v. Schoettler, 115 Cal. 388;

Bond v. United Railroads, 159 Cal. 270;

Redfield v. Ry. Co., 110 Cal. 277;

Parsons v. Easton, 184 Cal. 765;

Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

O'Reilly v. N. Y. & N. E. R., 16 R. I. 388, 17 Atl. 906;

Adams v. Fitchburg R. R. Co., 67 Vt. 76, 30 Atl. 687;
Slater v. Mex. Nat. Co., 194 U. S. 120;
Matheson v. Ry. Co., 61 Kan. 667, 60 Pac. 747;
Christilly v. Warner, 87 Conn. 461, 88 Atl. 711;
Raisor v. R. R. Co., 215 Ill. 47, 74 N. E. 69;
Romero v. Ry. Co., 11 N. M. 679, 72 Pac. 37;
Marshall v. Ry., 46 Fed. 269;
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Casey v. Ry. 116 Mo. App. 235, 91 S. W. 419;
Huntington v. Attrill, 146 U. S. 657;
Moss v. Smith, 171 Cal. 777;
Patterson v. Thompson, 86 Fed. 85;
Bank v. Remsen, 158 U. S. 337;
Mo. Pacific v. Ault, 256 U. S. 557;
Boston Etc. v. Hurd, 108 Fed. 116;
Hill v. Boston, Etc., 77 N. H. 151, 89 Atl. 482;
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Story v. Green, 164 Cal. 768;
Powers, *et al.*, v. Sutherland Auto Stage Co., 213 Pac. (Cal.) 494;
In re: Estate of Riccomi, 185 Cal. 458, 197 Pac. 97.

ARGUMENT.

I.

The said Circuit Court of Appeals, in accordance with petitioner's contention and the ruling of the District Court, having held that the case is governed by the rule that would have controlled it had it not been removed into the Federal Court and having also held that plaintiff can recover in this action, if at all, under section 1820 only, of said New Mexico statute, we suggest what we conceive to be the sole question in this case, namely:

Could or could not the plaintiff in error in this case have recovered in the state court had the case not been removed to the federal court?

The opinion of the Circuit Court of Appeals proceeds, we respectfully submit, upon the assumption that plaintiff in error could have recovered in the state of California unless the New Mexico statute is to be regarded as penal.

But we respectfully submit that to determine the New Mexico statute non-penal is not an answer to the question whether the plaintiff could have recovered in the state court of California.

For state courts have frequently refused a recovery upon a foreign statute, not on the ground that the foreign statute was penal, but on the ground that the foreign statute declared

a policy of law inconsistent with the policy of the forum in which the suit was brought.

This is illustrated in the case of McManus v. Canning Co., 37 Cal App. 133, where the court said:

> "Respondent's next contention is that plaintiff's alleged right of action for the wrongful death of his intestate, as given by the statutes of Alaska is contrary to the policy of the law of California and will not be enforced here. The statutes pleaded by plaintiff are section 1185 of the compiled laws of Alaska of 1913, codified by authority of the Act of Congress of August 24, 1912, chapter 387, section 19, 37 Stats. 518, and chapter 45 of the Session Laws of the Territory of Alaska, for 1913, approved April 3, 1913."

The court then quotes the statutes of Alaska and proceeds at the bottom of page 136:

> "It is settled law that an action for wrongful death like other actions on tort is governed by the law of the jurisdiction where the tort was committed, and as it is a transitory action it may be maintained in any jurisdiction where the defendant is found (citing cases) *unless the court where the suit is brought in enforcing the remedy would be acting in conflict with the express provisions or the general policy of the law* of its own jurisdiction. (Citing authority.)"

Then after discussing the meaning of the Alaska statute, section 1185, the court says, re-

ferring to a decision of said Ninth Circuit Court of Appeals:

> "It was there held that section 1185, like the Oregon statute from which it was originally taken, confers a right of action for wrongful death upon the personal representative of the decedent for the benefit of the estate and that any damages recovered become assets of the estate to be administered like any other assets. The creditors and the expenses of administration are to be paid out therefrom, if necessary, the balance going to the heirs, if there are any, and in default of heirs the state takes by escheat. We fully agree with counsel for respondent that this right of action created by section 1185 is contrary to the policy of the laws of California, for our Legislature in creating the action for wrongful death, which was unknown at common law, followed the provisions of Lord Campbell's Act adopted by Parliament in 1846, and our courts have adopted the construction given that act in Great Britain and in those states which have similar laws, namely that the action for wrongful death has been created for the benefit of those relatives of the decedent who have the right to look to him for aid and support, and that the damages to be given are limited to the actual pecuniary loss suffered by those relatives by being deprived of said aid.
>
> "Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action could not be maintained, for it would not be in accord with the policy of our laws to make

> a resident of our state pay damages for the death of decedent where no one was shown to have suffered any pecuniary loss thereby."

There was in the foregoing case of McManus no question of a penal statute, but solely a question of a difference in policy, and while the courts of California have not been called upon to determine the consistency or inconsistency of the policy of California with the policy of the New Mexico statute, certainly the New Mexico statute is much further removed in policy from the law of California and the policy of California than was the Alaska statute under which the California court held that no recovery could be had in that state.

To the point that the policy of the New Mexico statute is opposed to the established policy of the state of California we invite attention to the fact that the New Mexico statute, or the same statute of Missouri, has been the ground of action in Kansas, in Texas, in Illinois, in Iowa, and while some of the cases have spoken of the statute as penal, yet they have also declared that the policy of the statute is at variance with the policy of the forum and in every case have refused a recovery. What possible ground is there for assuming that California would be the one only state to allow recovery under the New Mexico statute?

As "death statutes" have been almost universally enacted, the discussion of "policy" usually turns on the extent of similarity between the local and foreign enactments.

If a right of action is given by a statute (not of a penal nature) of the state in which the injury and death occurred, the right may be enforced in any tribunal having jurisdiction over the defendant, *provided*, of course, that a substantially similar statute exists in the state of the tribunal. We do not claim that it is essential that the statute be precisely the same, but if it is of similar import and character it will suffice.

This, we understand, is the ruling in:

Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852;

Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593.

Without discussing in detail the questions of the similarity and dissimilarity of the various statutes involved in the many decisions on this subject, it is enough to say that where the foreign statutes were enforced, there was no substantial dissimilarity between the statutes involved and those of the forum. But in every case where either the Missouri or New Mexico statute was sought to be enforced or administered in a state other than that in which

enacted, the state tribunals refused to administer or enforce either of said statutes upon the ground that such statutes were opposed to the *lex fori*.

II.

The Policy of Section 1820 of the Statutes of New Mexico Is Opposed to the Policy of the State of California and It Is Submitted That There Is Nothing in the Case of Huntington v. Attrill, 146 U. S. 657, That Is Authority for the Enforcement in California of Said Section of the New Mexico Statute.

The Circuit Court of Appeals rests its opinion on the theory that the instant case is ruled by the case of Huntington v. Attrill, 146 U. S. 657. But it was not necessary to a decision in that case to determine whether the New York statute there under consideration was remedial or penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. Really the decision was based upon a consideration of the remedial provision of the statute in its protective aspect to a creditor:

Patterson v. Thompson, 86 Fed. 85;

National Park Bank v. Remsen, 158 U. S. 337;

Chase v. Curtis, 113 U. S. 452.

In the footnotes to section 10 of Minor on Conflict of Laws, may be found an illuminating discussion of the case of Huntington v. Attrill, 146 U. S. 657. The author points out that it was not necessary to a decision in that case to decide whether the New York statute was penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. The pertinent observations of the author are those respecting the enforcement of the foreign statute under rules of private international law and international comity. We quote what is there said because it is so peculiarly applicable to the situation here:

> "But in private international law, the ground of the enforcement of a foreign law is international comity, which is nothing more than the enlightened sentiment that exact justice may be meted out by requiring that a man's acts should be governed by the law under which he acts, provided the enforcement of that law will not conduce to injustice nor affect the interests of the forum. But if to hold a wrongdoer liable in double or treble damages to the party injured is not punishment to the former, it is certainly more than justice to the latter. *Justice* to him is satisfied by *compensatory* damages. Hence the forum, in endeavoring to mete out exact justice to the parties by enforcing a foreign law rather than its own, will find itself, under this view rendering to the injured party more than justice re-

> quires, and at the expense of the other litigant. He has a right to demand this under the *municipal* law, not because of justice, but because the positive law requires or permits it. But where he seeks to enforce his claim in another state, what right has he to ask this of the forum whose policy may be entirely different?"

So in the instant case, if the plaintiff were suing under California law for damages for alleged wrongful death in the courts of that state, he would be limited to the pecuniary loss suffered, as disclosed by the evidence, whereas, by invoking and seeking to enforce the provisions of the New Mexico law, assuming that actionable negligence has been shown, he recovers the arbitrary sum of $5000.00, regardless of damages.

Prior to 1905 the Missouri statute read, so far as material here,

> "shall forfeit and pay the sum of $5000."

In 1905 this statute was amended so as to read,

> "* * * shall forfeit and pay as a penalty, for every such person * * * so dying, the sum of not less than $2,000, and not exceeding $10,000, in the discretion of the jury, which may be sued for and recovered * * * by,"

In the case of Grier v. Kansas City etc. Ry. Co. (228 S. W. R. 454), the Supreme Court

of Missouri held that this statute was penal as to all amounts that might be recovered thereunder, and that it was in no sense compensatory as to sums exceeding $2000.00; the legislative purpose being to allow the jury to assess the punishment in accordance with the negligence and the loss.

Accordingly, the Springfield Court of Appeals of Missouri in the case of Pryor v. Payne (244 S. W. R. 369) held that there could be no recovery under this statute for the death of a traveler on a highway crossed by the railroad, against the Director General of Railroads because of any neglect in the operation of railroad trains, since such statute is purely penal and in no sense compensatory.

The case of The State of Indiana for the use of Cone v. John *et al.*, 5 Hammond (Ohio) 217, was an action on an official bond prescribed by the laws of Indiana and which allowed recovery to anyone injured by official default, to treble damages, full costs and charges. The Ohio court refused to enforce the remedy and said:

> "A state can enforce its contracts in our courts, the same as an individual suitor; but the remedy must be afforded according to our laws and practice."

Derrickson v. Smith, 27 N. J. L. 166:

Was an action in the New Jersey Circuit Court founded upon a staute of New York requiring corporations to file and publish annual reports, showing the condition of their affairs; a failure to file and publish such reports made the trustees jointly and severally liable for all debts then existing.

It was held that this statute could not be enforced in New Jersey because it was in the nature of a penalty for official neglect of duty.

Bird v. Hayden, 1 Robertson, N. Y. 383:

In that case it was held that personal liability imposed by Massachusetts statute upon the officers of a corporation who neglected or refused the performance of a duty, with which they were charged by the statute, was in the nature of a penalty, and designed as punishment for such neglect, and the New York court refused to enforce the statute.

Pickering v. Fisk, 6 Vt. 102:

Involved an action on a sheriff's bond executed in the state of New Hampshire for the public security and which provided that an action might be brought thereon for the benefit of anyone injured by official default. The Vermont court refused to entertain an action

against the sheriff and his bondsmen, giving as reasons therefor that:

> 'no sovereign state is bound by the laws of another, nor can the laws of another state operate *proprio vigore* within it. The observance of foreign laws rests in comity and convenience, and is a disposition of courts to adapt their proceedings to the great ends of justice. But there is a limit to this principle of comity; and cases may and do arise, where the observance of foreign laws would neither be convenient, nor answer the purposes of justice. Foreign laws, therefore, are not regarded, where they are irreconcilable with our own regulations, nor where, in our opinion, they conflict with our established policy."

Finney v. Guy, 189 U. S. 335:

This action was commenced in the proper court of the state of Wisconsin to enforce the shareholders' liability under a Minnesota statute, in a corporation in Minnesota and doing business in that state. A demurrer was interposed to the complaint. The demurrer was overruled by the trial court and judgment given for the plaintiff, which was reversed by the Supreme Court of the state. The case was taken to this Honoroble Court by the plaintiff to review the judgment of reversal. Under the Minnesota laws as construed by its courts, the only remedy provided for the enforcement of the liability of stockholders in domestic corporations was a suit

in equity in that state by a creditor in behalf of himself and all other creditors against the stockholders who could be served with process. This Honorable Court held that the courts of Wisconsin did not deny full faith and credit to a judgment of the Minnesota court against resident stockholders by denying the right to maintain a further action to enforce such liability outside the state. This court further said:

> "Whether, aside from the federal considerations just discussed the Wisconsin court should have permitted this action to be maintained, because of the principle of comity between the states, is a question exclusively for the courts of that state to decide. The right to maintain it under the facts of this case is not founded upon any provision of a federal nature, and we cannot supervise the action of the Wisconsin court in this particular. The judgment of the Supreme Court of Wisconsin must be affirmed."

In *O'Reilly v. N. Y. & N. E. R. Co.*, 16 R. I. 388, 17, Atl. 906, the head note reads:

> 2. "Pub. St. Mass. c 112, par. 213, provides that if a person is injured by collision with the engine or cars of a railroad corporation at a grade crossing, and the neglect of the corporation to give the signals required by law has contributed to the injury, the corporation shall be liable, in case of death of the party injured, to damages, recoverable by the executor or administrator of the deceased in an action of

tort, as provided in Sec. 212, unless it is shown that, in addition to a mere want of ordinary care, the deceased was guilty of gross or wilful negligence, etc. Sec. 212 provides, that, where the life of a person is lost through the carelessness of such a corporation, it may be punished by fine or indictment, or sued for damages in an action of tort, the fine imposed or the damages recovered to be not less than $500 nor more than $5000; damages, in case the corporation is civilly prosecuted to be assessed with reference to the degree of culpability of the corporation. Held, that the liability imposed by such statute was penal, and that an action could not be maintained under it in Rhode Island, whose statutes, making railroad companies liable for negligence resulting in death, have none of the penal features of the Massachusetts statute."

The opinion sustains the head note in every particular. The court refers to Dennick v. Railroad Co., 103 U. S. 11; Leonard v. Navigation Co., 84 N. Y. 48; Stoeckman v. Railroad Co., 15 Mo. App. 505 and points out that the liability in question in each of said three cases was remedial, not penal; the rule of liability being no more exacting than it would have been in favor of the deceased, if he had survived and the damages recoverable being *recoverable as compensation.*

In the case of *Adams v. Fitchburg R. Co.*, 67 Vt. 76, 30 Atl. 687, this same Massachusetts

statute was made the basis of recovery, but the Vermont court held that it was a penal statute and hence an action thereunder could not be brought in another state. In considering the Massachusetts statute, the court said:

> "The foundation of the action is the loss of a life by reason of the defendant's negligence. There was no right of action at common law. This statute gives a right-of-action to the personal representative of the deceased for the benefit of the widow and children, or widow, and next of kin. If the right of recovery is established, the damages are to be $500 in any event. Any recovery beyond this is to be assessed with reference to the degree of the defendan't culpability. It appears, then, that whatever the damages may be, or whomsoever the person for whose benefit they are recovered, they are not given with reference to the loss sustained * * * The wrongdoer is to be punished, whether the person receiving the amount of the recovery has sustained a substantial injury or not."

The court further said, that a statute may be penal, although the entire amount recovered be given directly to the party injured.

Under the law of California "the damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given, from the death or injury of the victim."

Bond v. United Railways, 159 Cal. 277.

Nor can exemplary damages be awarded even if the act causing death was wanton, since section 377 of the California Code of Civil Procedure is a new action and not the action which the deceased might have brought for the wrong had he survived.

Hence, only such damages can be recovered as the statute authorizes, and cannot include any grievance personal to the deceased nor any "damage allowed in the interests of the people as punishment."

Lange v. Schoettler, 115 Cal. 388.

In the Estate of Riccomi, 185 Cal. 458, the court in considering section 377 of the Code of Civil Procedure of that state and the settled construction of the statute and its purpose and object, said:

> "It is settled that the action authorized by the section is one *solely* for the benefit of the heirs by which *they may be compensated for the pecuniary loss suffered by them* by reason of the loss of their relative."

Further along the court reiterates:

> "In this case the important thing to bear in mind is that the action 'for damages' for the benefit of the 'heirs' is one solely for the *purpose of compensating them for the pecuniary loss suffered by them* by reason of the death of the deceased. An examination of the decisions involving questions of

> the elements of damage to be considered in such cases demonstrates this: While there can be but one action brought or one recovery had either by the personal representative of the deceased or the heirs (see Daubert v. Western Meat Co., 139 Cal. 480; [96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244]), and while the recovery in such an action should be of a single 'lump sum' for all (see Robinson, *et al* v. West. States, etc. Co., 184 Cal. 401 [194 Pac. 39]), the total recovery to be had is the aggregate of the pecuniary loss of each of the heirs who has suffered a pecuniary loss by reason of the death of the deceased. As put in Robinson v. Western States, etc. Co., *supra*, this 'lump sum' includes 'of course, the damages to each of them' * * * It follows inevitably, that there can be no substantial recovery on account of any heir who has not suffered substantial pecuniary injury."

In *Powers, et al v. Sutherland Auto Stage Co., et al*, 213 Pac. (Cal.) 494, the court said:

> "It is well settled in California that the only damages recoverable by heirs under Sec. 377 of the Code of Civil Procedure, are compensatory damages 'for the pecuniary loss to them by reason of his death,'" citing, Estate of Riccomi, *supra*.

In the case of Hopper v. Denver, etc., R. Co., 155 Fed. (Eighth C. C. A.) 273, the court had under consideration a Colorado statute which created an action for death negligently caused by a public carrier and which statute

declared that every such public carrier should forfeit for every person and passenger, so injured or killed, not more than $5000.00 nor less than $3000.00. The question of the validity of that statute was left open and the court also passed, without deciding, whether the statute, if valid, could be enforced outside of the state court of Colorado. Judge (now Mr. Justice) Van Devanter, speaking for the court, made this very pertinent observation:

> "It may be that in the further progress of the case it will become necessary to consider whether the provision in section 1508 for a minimum recovery of $3000, irrespective of actual pecuniary injury, is valid, and, if so, whether that section is thereby made penal in the sense that it may be enforced only in the courts of Colorado (see Philpott v. Missouri Pac. Ry. Co., 85 Mo. 164; Carroll v. Missouri Pac. Ry. Co., 88 Mo. 239, 246, 57 Am. Rep. 382; Marshall v. Wabash R. Co. (C. C.), 46 Fed. 269; Dale v. Atchison etc. Co., 57 Kan. 601, 47 Pac. 521; Matheson v. Kansas City etc. Co., 61 Kan. 667, 60 Pac. 747; Adams v. Railroad Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Brady v. Daly, 175 U. S. 148, 25 Sup. Ct. 62, 44 L. Ed. 109; Boston & Maine R. R. Co. v. Hurd, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193; s. c. 184 U. S. 700, 22 Sup. Ct. 939, 46 L. Ed. 765; McCabe v.

American Woolen Co. (C. C.), 124 Fed 283; s. c. 65 C. C. A. 59, 132 Fed. 1006; Malloy v. American Hide & Leather Co. (C. C.), 148 Fed. 482, Wharton's Conflict of Laws (3d Ed.), Secs. 4b, 480a; Atlanta v. Chattanooga Foundry, 61 C. C. A. 387, 392, 127 Fed. 23, 28, 64 L. R. A. 721; s. c. 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L. Ed. 241; Johnson v. Southern Pac. Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363.)"

If the enforcement of the Colorado statute in a federal court, sitting in that state, was a question of serious doubt, obviously, it ought to be decisive of the proposition that the New Mexico statute here involved cannot be enforced or administered in California or in a federal court sitting in that state, and that the New Mexico statute can be enforced or administered, if at all, in the state of New Mexico only.

III.

Under the New Mexico Statute, if the Plaintiff Recover He Will Recover Five Thousand Dollars, Neither Less Nor More, Regardless of Damages.

In the case of *Romero v. Atchison, Topeka & Santa Fe Ry Co.*, 11 N. M. 677, 72 Pac. 37, the court, after drawing attention to the statute here under consideration being in derogation of the common law and that such statute was bor-

rowed from the state of Missouri, and after stressing the point that the Supreme Court of Missouri had construed the statute as creating the right itself to recover for the death of a passenger, said:

> "In this case the complaint charges that Leyba was killed by the negligence of the employes of the defendant company, a common-carrier, and this is not denied. If, therefore, a right of recovery existed at the time of the occurrence, it was clearly under section 3213, Comp. Laws of 1897—the only section relating to such cases. Counsel for appellant, in his ingenious brief, and also in his oral argument, insisted that in such case a suit might be maintained under section 3213 by one of the persons authorized by that section, and a second suit be maintained at the same time for the same cause of action by the representatives of the deceased, under sections 3214 and 3215, but it appears to us that the mind of the learned counsel is more prolific of remedies than the statute. But, however, that may be, the contention is repugnant to what we conceive to be the plain meaning of the statute, as it is incomprehensible that the legislature should intend to provide a double remedy in damages for one and the same injury, and between practically the same parties. If, then, the remedy in this case existed under the terms of section 3213, the suit could not be brought by the administrator or other representative of the deceased, but must be brought by one of those persons specifically authorized to sue. There was

an absolute want of authority in the plaintiff to sue in a representative capacity, as that section excludes representatives by omitting them and specifically designating others. This objection to the complaint was raised by the demurrer, and, as it was not alleged that the plaintiff was one of the persons authorized by that section to sue a common carrier, the complaint was clearly obnoxious to the demurrer, and the court properly sustained the same.

The plaintiff electing to stand by his complaint, the court rendered judgment for the defendant, dismissing the cause at plaintiff's costs. There was no error in this action of the court, and the judgment of the court below will be affirmed, with costs, and it is so ordered."

Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

Marshall v. Wabash, 46 Fed. 269;

Clay v. Ry. Co. (Tex.), 228 S. W. 907.

He recovers this amount without proof of damage, with no opportunity afforded the defendant to show that no damage has resulted

Casey v. St. Louis Etc., 116 Mo. App. 235, 91 S. W. 419;

Raisor v. Chicago Etc., 215 Ill. 47, 74 N. E. 69.

But the policy of California is that the amount of the damages in such cases shall be determined according to the evidence of pe-

cuniary loss and that they shall be strictly compensatory for the pecuniary loss as proved.

A statute like the one in New Mexico, which authorizes recovery without any showing of damages can hardly be called one for the recovery of damages.

Section 377, California Code of Civil Procedure, reads as follows:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other persons. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

It will be observed that this statute has none of the penal features of the New Mexico statute, and does not discriminate between common carriers and other corporations and individuals.

This statute has, as hereinbefore noted, been under consideration in the courts of California many times. Thus in the case of Lange v. Schottler, 115 California 388, Mr. Justice Temple, writing the opinion of the court, said:

> "The first point, although apparently based upon the alleged insufficiency of the evidence, is that the jury was erroneously instructed that they could allow exemplary

damages, if the act causing death was wanton, cruel and malicious. I think this instruction erroneous and that it was probably given under much misapprehension as to our statutes upon the subject. It has been uniformly ruled that the action provided for in section 376 of the Code of Civil Procedure is a new action and not the action which the deceased might have brought for the wrong had he survived. Only such damages can be recovered as the statute authorizes and in the absence of an express provision authorizing a different rule the only damage allowed is for the probable value of the life to those in whose behalf the action is brought. Of course this cannot include any grievance personal to the deceased or any *damage allowed in the interest of the people as punishment.*

* * * * * * * *

"The statute of 1862 expressly allowed the jury to give exemplary damages, and this provision was carried into the first editions of the codes. It authorized such damages 'pecuniary and exemplary' as the jury should deem just. In 1874, section 377 was amended by striking out the words 'pecuniary and exemplary.' The purpose of this amendment must have been to take away the right to exemplary damages and to make the rule accord with the general rule elsewhere.

"The decisions upon this matter are cited and discussed in Munro v. Pacific Co., 84 Cal. 515. In that case, while holding that in the case of a wife or mother, suing under the statute the jury may take into consideration the loss of the comfort, society and protection of the deceased, yet

the remark of Mr. Justice Wills that the subject matter of the statute is compensation for injury by reason of the deceased not being alive, is quoted with approval, and it is declared that the recovery can only be for the pecuniary injury to the relative. In the same case an instruction was given that the jury must not allow exemplary damages, but could consider the sorrow, grief, etc., of the mother. Instruction was held erroneous solely because it allowed damages for the grief occasioned by the death, and because such injury is not a pecuniary loss."

In Redfield v. Oakland Ry., Etc., 110 Cal. 277, the opinion said it is contended by appellant that so many states have determined that it is wise to limit the amount that can be recovered as damages in cases like the present that we should look to such limits in determining the amount to be recovered and be governed thereby; but such statutes were in existence long before section 377 of the Code of Civil Procedure was enacted, and this provision of the code is a direct *determination of our Legislature that the policy adopted by other states in that regard should not exist here.*

In Parsons v. Easton, 184 Cal. 765, opinion by Justice Shaw, at page 770, he quotes from Bond v. United Railways, 159 Cal. 277:

"The damages are limited to the pecuniary loss suffered by the person or per-

> sons for whose benefit the right of action is given, from the death or injury of the victim."

In Parson's case, above cited, a verdict of $6000.00 was held to be clearly greater than the evidence warranted for the death of a son 27½ years of age, who had been at times insane, and who was somewhat deformed.

See also:

Estate of Riccomi, supra;

Powers, et al, v. Sutherland Auto Stage Co., supra.

The courts of California have not been asked to enforce this statute of New Mexico, but the courts of other states having the same policy that California has concerning measure of damages, have repeatedly refused to allow recovery under the New Mexico statute or under the statute of Missouri from which the New Mexico statute was copied.

In Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69, the court, after discussing the statute of Missouri, which was the same as the statute of New Mexico, said near the close of the opinion:

> "Is the Missouri statute contrary to the public policy of this state? In order to ascertain the policy of the state in respect

to any matter, the acts of the legislative department must be looked to. It is not within the province of the courts to create public policy. Their province is limited to declaring it when ascertained. (Citing cases.) In 1845 the Legislature adopted as the law of this state the common law of England and all statutes or acts of the British Parliament made in aid thereof and to supply the defects of the common law prior to the 4th year of James the First. This includes the common law forms of action, *ex contractu* and *ex delicto*, and at common law the plaintiff in an action *ex delicto* or in any action sounding in damages cannot recover substantial damages without proof that he has suffered some. Two elements must concur to entitle the plaintiff to recover substantial damages—injury and actual damages—and these two must be proved. On proof of injury alone nominal damages may be recovered, as the law presumes some damage on proof of injury. But there can be no recovery of actual or substantial damage in the absence of proof thereof. But the Legislature has expressed itself with regard to the very subject matter of the present suit, namely the death of a person caused by wrongful act, neglect or default. In such case an action may be brought in the name of the personal representative of the deceased for the benefit of the widow and next of kin. But the statute contains the provision: 'In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to

> the wife and next of kin of such deceased person, not exceeding $10,000.' (Citing the statute.) Our statute is substantially a copy of the first two sections of 9 and 10 Victoria, chapter 93, and of the New York statutes on the same subject, and it has been held in England, New York and this state that the pecuniary loss to the widow and next of kin is the sole measure of damages and that when there has been no pecuniary loss there can be no recovery. (Citing cases.) It is therefore as we think contrary to the policy of this state as evidenced by the acts of the Legislature to permit a recovery for damages on mere proof of neglect or default of the defendant and without proof that the plaintiff has suffered any pecuniary loss."

In Marshall v. Wabash, 46 Fed. 269, in considering the same Missouri statute, Judge Sage said:

> "Where the plaintiff is not required to offer any evidence proving damages and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely and not penal."

Judge Sage makes this very pertinent comment:

> "I doubt whether the Legislature has the power to enact a statutory provision for liquidated damages even where it has the right to create a cause of action. It may

> for reasons of public policy enact and enforce a penal statute and provide that the plaintiff shall have the benefit of the penalty, but if the statutory damages are to be treated as compensatory merely, it strikes me that the attempt of the Legislature to fix them by an arbitrary, inflexible rule, would be in conflict with the constitutional right of the defendant to a jury trial."

The New Mexico statute itself came before the court of Kansas in Dale v. Atchison, 57 Kas. 601, 47 Pac. 521, the court saying that it was the same in substance as the Missouri statute which had been under consideration in Hamilton v. Ry., 39 Kas. 56, 18 Pac. 57; that it had been held by the courts of Missouri that the recovery must be for the full amount and nothing less, and that a verdict for half the amount, or $2500.00, would be set aside by the court, and adds:

> "Another and perhaps more serious difficulty lies in the penal character of the statute of New Mexico, although it is argued that the law of that territory provided for the payment by the wrongdoer of a sum of money to his widow or minor children and that they are the ones usually, if not invariably, the most injured by his death, and that the money to be paid under that statute subserved really the same purpose as money paid under the laws of Kansas, and compensates them in some degree for the loss of husband and father, it is ap-

> parent that the theory of the law of the two states is different. In Kansas it is strictly compensatory. In New Mexico it may be strictly penal, for it might happen that the person killed was a burden upon his family, contributing nothing to them."

And the court felt constrained to hold "that the courts of this state will not undertake the enforcement of a statute penal in part and *so dissimilar in principle from the law of our own state.*"

In Clay v. Ry. Co. (Tex.), 228 S. W. 907, the court remarked that the recovery provided for by section 1820 of the statute of New Mexico is inflexible and is aimed at the culpability of employes of the railway company rather than based upon the extent of injury, thus partaking more of the nature of a penalty than of a right created.

Mattheson v. Kansas City, Etc., Ry. Co., 61 Kansas 667, 60 Pacific 747, involved the statute of Missouri to which reference has already been made in this brief. The court referred to the Dale case, already cited, and adds that an arbitrary award of a fixed amount of damages regardless of pecuniary loss sustained is antagonistic to the policy of Kansas, and is palpably inconsistent with the Kansas statute authorizing a recovery in such cases, where the

plaintiff must show a pecuniary loss and the recovery is limited to the actual damages sustained. If the life of the deceased is of no pecuniary value to the next of kin, no more than nominal damages can be recovered. The court further said:

> "There have been a number of such cases, an illustration of which can be found in Railroad Company v. Weber, 33 Kansas 543, 6 Pacific 877, where the jury especially found that the life of the deceased was of no pecuniary value to those for whose benefit the action was prosecuted. The arbitrary forfeiture of $5000 in such a case arising under the Missouri statute would be peculiarly punitive, and the fact that the penalty was bestowed on relatives of the deceased would not take away the penal character of the award. It is contended that the statute is not penal and cannot be so regarded, unless the penalty is paid to the state as a punishment for the wrong committed. In a strict and limited sense, a penal statute is one imposing punishment for an offense committed against the state, but we think this altogether too narrow and restricted a view to take of statutes like the one under consideration."

Christilly v. Warner, 87 Conn. 461, 88 Atlantic 711, was an action brought in the state court of Connecticut to recover for wrongful death suffered in Massachusetts. The court lays down certain general principles and discusses the Massachusetts statute as it gradually de-

veloped into its present form (which permits a recovery of not less than $500 or more than $10,000, to be assessed with reference to the degree of defendant's culpability or that of his agents or servants), and then said:

> "We have never allowed a recovery in a case of a negligent death upon any theory save that upon just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law."

Some of these opinions characterize the New Mexico and Missouri statutes as "penal." It is not penal according to the strict use of that term as explained and elaborated in Huntington v. Attrill, 146 U. S. 657. But the New Mexico statute is penal in the common use of the term; that is, it imposes a penalty.

In Moss v. Smith, 171 Cal. 777 (784) it is said:

> "Huntington v. Attrill, 146 U. S. 657, upon which appellants rely as supporting their contention that section 309 is a remedial and not a penal statute is explained by Judge Gilbert in Patterson v. Thompson, 86 Fed. 85, who shows that the question before the Supreme Court was solely whether such statutes were penal law in the sense in which the word is used in international law."

The same statute that was under consideration in Huntington v. Attrill was again before this Honorable Court in International Park Bank v. Remsen, 158 U. S. 337, and it was distinctly declared to be in its nature a penal statute as had previously been held in Chase v. Curtis, 113 U. S. 452.

In Patterson v. Thompson, 86 Fed. 85, involving the personal liability under the Oregon statute of a director in a saving bank, it is said (p. 87):

> "Counsel for plaintiff contended that by the decision in Huntington v. Attrill, 146 U. S. 657, the Supreme Court has overruled its former holding that such a statute is penal. It will be seen, however, on careful consideration of that case, that the decision was based upon a consideration of the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of Bank v. Remsen, 158 U. S. 337, it was again ruled that such a statute is one of a penal character, and in the opinion the court remarked that the purport of the decision in Huntington v. Attrill was that such a statute was not a penal law in the international sense."

National Park Bank v. Remsen, 158 U. S. 337; opinion by Justice Brewer; suit for re-

covery under New York statute for failure of directors to make report (page 342), the opinion says:

> "That this statute is one of a penal character is settled, not merely by various decisions of the court of appeals of New York, but also expressly by this court in Chase v. Curtis, 113 U. S. 452, though as since held not a penal law in the international sense. Huntington v. Attrill, 146 U. S. 657."

Mo. Pac. v. Ault, 256 U. S. 554, was a suit to recover wages under a statute of Arkansas providing that if a railroad company should discharge an employe it shall pay him his full wages within seven days, otherwise as a penalty for such non-payment the wages of such employe should continue at the same rate until paid. In the lower court Ault recovered $50.00, his wages up to the time of discharge and $390.00, wages from that date on. The court held that everything above $50.00 was penalty or forfeiture, but said it was in the nature of a punishment; that the Supreme Court of Arkansas had held that it was not technically a penalty, but was allowed for a double purpose, namely as compensation for delay and as punishment for failure to pay; that it had all the elements of exemplary damages. This Honorable Court said:

> "Whatever name be applied, the element of punishment clearly predominates."

And that the judgment against the director general so far as it provided for recovery of the *penalty* was erroneous.

But the principle underlying all the opinions which we have cited, denying recovery of arbitrary amounts fixed by the law of another state, is really that those statutes are contrary to the policy of the forum. If the law of the forum gave similar right, the court would sustain a complaint under the foreign law.

It is also true that the doctrine of Huntington v. Attrill requires a court of California to permit recovery upon a judgment recovered in another state, although that judgment was obtained on a complaint which would not be held to state a cause of action in California. For instance, if a plaintiff recovers judgment in Louisiana on a gambling contract, he may sue on that judgment in California and recover, although he could not have recovered here on the contract itself. He must still reduce his demand, whatever it be, to judgment in a court of some jurisdiction whose policy permits recovery on such a demand. Thus the federal court sitting in New Hampshire will entertain an action on the Massachusetts statute, giving a recovery of damages for wrongful death and not measuring the damages by the rule of compensation.

Boston, Etc. v. Hurd, 108 Fed. 116.

That accords with the policy of New Hampshire.

Hill v. Boston etc., 77 N. H. 151, 89 Atl. 482.

The case of Huntington v. Attrill was decided in 1892, thirty-one years ago; and ever since then the courts, both state and federal, have gone on as before enforcing the policy of the *lex fori* and uniformly refusing judgment contrary to that policy; with the single exception that in a suit on a judgment obtained in a sister state on due process of law in an action not strictly penal, the respective policies of the two states cannot be considered.

Before the decision of Huntington v. Attrill, the statute here in question or the like statute of Missouri had been attempted to be used as a basis of recovery in the federal court in Ohio:

Marshall v. Ry. Co., 46 Fed. 269;

and since that decision in the state courts of Texas:

Clay v. Ry. (Tex.), 228 S. W. 907.

Kansas:

Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

Matheson v. Ry. Co., 61 Kan. 667, 60 Pac. 747.

Iowa:

Armbruster v. Ry. Co., 166 Iowa 155, 147 N. W. 337.

Illinois:

Raisor v. Ry. Co., 215 Ill. 47, 74 N. E. 69.

And in every instance where either of these statutes has been made the basis of an action in another state, either before or since the case of Huntington v. Attrill, recovery has been refused.

A similar case is

Christilly v. Warner, 87 Conn. 461 (1913), 88 Atl. 711.

Defendant negligently killed a child in Massachusetts, where the statute provided that he should be liable in damages in the sum of not less than $500 nor more than $10,000, to be assessed with reference to the degree of his culpability, one-half to be for the use of the widow and one-half for the use of the children of the deceased, or if no widow the whole to the use of the next of kin. The court said:

> "We do not enforce the foreign statutes which are penal. We do not enforce the law of another jurisdiction which we conceive to be injurious to our public rights or to the interests of our citizens or which offend our morals or contravene our public policy or violate our positive laws. We have never allowed a recovery in a case of negligent death upon any theory save that of

just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law." (Citing cases.)

IV.

There is no question but that the Legislature of New Mexico in the enactment of Sec. 1820, clearly discriminated between common carriers and other corporations and individuals. This is clearly shown in the case of *Romero v. A. T. & S. F. Ry. Co., supra.* It is further to be noted in the case just cited that the court mentions the statute of the state of Colorado as being practically identical with the New Mexico statute. The court made this further comment:

> "The statute of the state of Colorado is practically identical with our own, and in construing that statute, the Supreme Court of Colorado said: 'The Legislature discriminated between common carriers and other corporations and individuals. They confined section 1 to the former, while section 2 includes the latter. They desired to impose a different liability upon common carriers from that resting upon all other persons, and chose this way of doing it.' *A. T. & S. F. Ry. Co. v. Farrow,* 6 Colo. 498."

It is contrary to the public policy of California to differentiate between common carriers

and other defendants in personal injury cases with respect to the measure of damages. In that state the rule of compensation applies in favor of all and against all, so that neither plaintiff's poverty nor defendant's wealth shall be permitted to augment damages for negligence causing death.

Story v. Green, 164 Cal. 768;
Lange v. Schoettler, 115 Cal. 388;
Redfield v. Oakland Ry., 110 Cal. 277;
Parsons v. Easton, 184 Cal. 765;
Estate of Riccomi, 185 Cal. 456;
Powers *et al.* v. Sutherland Auto Stage Co., 213 Pac. (Cal.) 494.

The refusal of state courts to entertain actions on foreign laws not harmonizing with the policy of the forum is not condemned by this court—is indeed approved and adopted.

Slater v. Mexican National R. Co., 194 U. S. 120, 48 L. Ed. 900, was an action in the federal court in Texas to recover for death suffered in Mexico. The court considers the Mexican statute and the provisions made by that statute with respect to decree, damages and parties benefited, and adds:

> "The present action is a suit at common law and the court has no power to make a decree of this kind contemplated by the Mexican statute. What the Circuit Court

did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong and was excepted to specifically. * * * Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts." (Citing cases.)

V.

It is submitted that section 1820 of the New Mexico statutes upon which plaintiff's alleged cause of action must be predicated, which arbitrarily declares a forfeiture and requires the payment of $5,000.00 neither less nor more exclusively in the case of the death of a person resulting from injuries incurred while a passenger upon a railway or stage line, regardless of damages, is so widely at variance with and so radically different from the settled policy of California, respecting the measure of damages, that such foreign statute would not be administered or enforced by the courts of California.

It is further submitted that the New Mexico statute is directly opposed to the policy of California in that it treats common carriers, in case of the death through negligence of a person as passenger, as *sui generis*, whereas, in California, but one cause of action is given, a single standard of liability created, against all

tort feasons, be they individuals, corporations or common carriers. It is perceived that the New Mexico statute is further radically different in that regard and that these are material departures from California laws and policies.

In conclusion, we respectfully submit upon the authorities cited and for the reasons hereinbefore given, that section 1820 of the statutes of New Mexico is not enforcible for the benefit of the plaintiff in error in this action.

Therefore, it is submitted that the judgment of the Circuit Court of Appeals ought to be reversed; and the judgment of the District Court in favor of the petitioner affirmed.

Aug. 27, 1923.

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